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Editorial

"Fairness and a fresh start on judges," Senator John Cornyn, Ft. Worth Star-Telegram, 5/1/05

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In The Press

"Frist: Showdown with Democrats over court nominees may be 'inevitable'", Kathy Kiely, USA Today, 5/1/05

Noteworthy

Senator Allen (Meet the Press, 5/1/05)

"My view is that these nominees, outstanding nominees, should, after they've been vetted and people look at their judicial philosophy -- and I like judges who will apply the law, not invent it -- that senators ought to have the backbone and spine to get off their haunches and vote yes or vote no."

Senator Hagel (Face the Nation, 5/1/05)

"The Senate was primarily built around protection of minority rights. Should a president get an up-or-down vote on his judicial nominees? Absolutely, I think he should. But as you heard in the first segment, neither party's hands are clean on this. The Republicans torpedoed 60 Democrats. I think the Democrats are making a mistake in how they're going about this, in holding 10 of these appeals court nominees hostage."

Senator Brownback (Face The Nation, 5/1/05)

"I think the president got it right. I read through that comment later. And he says, I think they're opposed to my judicial nominees because they're not going to legislate from the bench. And you've seen in this country over the last 40 or 50

years a great deal of legislating from the bench, where the court takes it upon itself to look and to say, Well, OK, we think this ought to be here.

"And a lot of people around the country react negatively to that...because they're saying, Look, a judge should be -- they're interpreting the law, not writing it. And I think that's really the basis the president is trying to put forward, some nominees that'll be more strict constructionists, stay within the Constitution... and the role of judiciary."

FILIBUSTER 101 Cloture, "the nuclear option" and why 60 is the magic number

Fairness and a fresh start on judges
By John Cornyn
Special to the Star-Telegram

Few issues have become as politicized and poisonous as the confirmation of federal judges. So two years ago, the 10 freshman members of the U.S. Senate signed a bipartisan letter, "united in our concern that the judicial confirmation process is broken and needs to be fixed," and stating that "the United States Senate needs a fresh start."

Those sentiments remain worthy today. Americans of good faith might disagree about certain controversial issues, but we should all agree on at least the following three principles:

• We need judges who will follow the law, not rewrite our laws from the bench -- judges who will implement, not make, political decisions.

Unfortunately, many interest groups seek to impose their ideological agendas on the nation by allowing onto the bench only those judges who will rule in their favor. These actions threaten judicial independence because they politicize the judiciary and the confirmation process.

Indeed, in recent years courts have become increasingly aggressive in making political decisions for the country: from the definition of marriage to the expulsion of the Pledge of Allegiance and other expressions of faith from the public square; from attempts to abolish the three-strikes-and-you're-out law to efforts to restrict the death penalty; from removing the Boy Scouts from military bases to removing military recruiters from college campuses.

There is a natural temptation to respond to these rulings by requiring all judicial nominees to subscribe to certain political views as part of the confirmation process. But any litmus test is wrong, regardless of whose ideological agenda it might serve.

Many conservatives, for example, were gravely disappointed that the courts did not rule in favor of preserving Terri Schiavo's life. But the last thing we should do is to demand that judges make promises to politicians as a condition of taking the bench.

• We need a fair process -- and fair standards -- for selecting fair judges.

The Senate should carefully examine every nominee's qualifications. The Senate should also afford every member the opportunity to debate and to persuade colleagues. But after full investigation, full questioning and full debate, there should be a vote.

In years past, too many judicial nominees -- under presidents of both parties -- have not received a fair process, and things have only gotten worse with the current filibuster crisis. I believe that every senator is entitled to vote his or her conscience, and that every judicial nominee is entitled to an up-or-down vote -- and I support reforms to put these principles into practice.

In addition, the standards that we apply to judges must also be fair. President Bush has nominated an extraordinary and diverse class of exceptional judicial nominees of good character and a record of achievement. It is unfair to subject them to destructive personal attacks. It is unfair to disqualify them because of clients they once represented. And it is unfair to target them because of personal religious or political beliefs.

We have always considered nominees based on the mainstream support of a bipartisan majority of the Senate -- not the virulent opposition of a partisan minority of senators.

For example, prior to her service on the federal bench, Justice Ruth Bader Ginsburg served as a general counsel of the American Civil Liberties Union -- not a "mainstream" organization but rather a liberal one. Moreover, she had previously written that traditional marriage laws are unconstitutional and that taxpayer funds must be available to pay for abortions.

Although many Americans do not consider these particular views to be in the political mainstream, the Senate nevertheless approved her nomination to the Supreme Court by an overwhelming and bipartisan 96-3 vote because of her judicial record.

• The rules for determining who shall serve on the bench should be the same, regardless of who is president and who is in the Senate.

Surely it would be wrong to say that a 51 percent vote can elect a Democrat to office but that only a 60 percent vote can elect a Republican to office. Likewise, for more than 200 years, our Senate and constitutional traditions have always provided that a 51 percent vote of the Senate is sufficient to confirm a judicial nominee.

Every judicial nominee who has ever received the support of a majority of senators has been confirmed for the federal bench. These longstanding rules and traditions should not be changed simply because some interest groups in Washington do not like our current president or his judicial nominees.

It is wrong to politicize our judicial selection process by applying different rules to nominees of different parties. And there is a remedy. A majority of senators has always possessed the authority to restore Senate traditions by reforming the chamber's rules and procedures.

Such authority is expressly stated in the Constitution, endorsed by the U.S. Supreme Court, previously supported by leading senators of both parties and exercised by the Senate on numerous occasions.

Some senators are now arguing, however, that unless a minority of senators is allowed to continue abusing the rules to require a 60 percent standard, they will shut down the Senate. That would be wrong and extreme. That would truly be a "nuclear option."

Senators have the duty to find a reasonable solution to this problem -- and then to get back to the rest of the people's business. The last thing we should do is to shut down the government just because a majority of senators exercised their constitutional authority to confirm fair judges through a fair process.

John Cornyn is a U.S. senator representing Texas. John Cornyn is a member of the Senate Judiciary Committee. He is a former state supreme court justice and attorney general.

Break the Filibuster , The Weekly Standard

From the May 9, 2005 issue: *Democrats are looking to the Constitution to preserve the judicial filibuster; the Constitution isn't on their side.*

by William Kristol

05/09/2005, Volume 010, Issue 32

SUDDENLY DEMOCRATS ARE WRAPPING THEMSELVES in the Constitution. Emphasizing his commitment to maintaining the filibuster as a way to stop President Bush's judicial nominees, Senate Democratic whip Richard Durbin said last week, "We believe it's a constitutional issue. . . . It's a matter of having faith in the Constitution." The trouble is, the filibuster is nowhere mentioned, or even implied, in the text of the Constitution.

Suddenly, too, European liberals are discovering the virtues of the Founding Fathers. On the same day that Durbin was confessing his faith in the Constitution, the editors of the

Financial Times were urging Bill Frist to "cease and desist" his efforts to break the filibuster, imploring him to "reread the wisdom of the Federalist Papers." The trouble is, the filibuster is nowhere mentioned, or even implied, in the Federalist Papers.

What's really going on here, of course, is this: President Bush, having been elected and reelected, and with a Republican Senate majority, wants to appoint federal judges of a generally conservative and constitutionalist disposition. The Democrats very much want to block any change in the character of the federal judiciary--a branch of government they have increasingly come to cherish, as they have lost control of the others. It's a political struggle, not unlike others in American history, with both sides appealing to high principle and historical precedent.

But it happens to be the case that Republicans have the better argument with respect to the filibustering of judicial nominees. The systematic denial of up or down votes on judicial nominees is a new phenomenon. Republicans are right to say that it is the Democrats who have radically departed from customary practice.

More important, perhaps, the customary practice of not filibustering presidential nominees--whether for the judiciary or the executive branch--is not a mere matter of custom. It is rooted in the structure of the Constitution. While the filibuster of judges is not, in a judicially enforceable sense, unconstitutional, it is contrary to the logic of the constitutional separation of powers.

As David A. Crockett of Trinity University in San Antonio has explained, the legislative filibuster makes perfect sense. Article 1 of the Constitution gives each house of Congress the power to determine its own rules. Senate Rule XXII establishes the necessity of 60 votes to close off debate. With this rule, the Senate has chosen to allow 40-plus percent of its members to block legislative action, out of respect for the view that delaying, even preventing, hasty action, or action that has only the support of a narrow majority, can be a good thing. As Crockett puts it, "Congress is the active agent in lawmaking, and if it wants to make that process more difficult, it can." One might add that legislative filibusters can often be overcome by offering the minority compromises--revising the underlying legislation with amendments and the like.

There is no rationale for a filibuster, however, when the Senate is acting under Article 2 in advising and consenting to presidential nominations. As Crockett points out, here the president is "the originator and prime mover. If he wants to make the process more burdensome, perhaps through lengthy interviews or extraordinary background checks, he can." The Senate's role is to accept or reject the president's nominees, just as the president has a responsibility to accept or reject a bill approved by both houses of Congress. There he does not have the option of delay. Nor should Congress have the option of delay in what is fundamentally an executive function of filling the nonelected positions in the federal government. In other words--to quote Crockett once more--"it is inappropriate for the Senate to employ a delaying tactic normally used in internal business--the construction of legislation--in a nonlegislative procedure that originates in a coequal branch of government."

This is why the filibuster has historically not been used on nominations. This is the constitutional logic underlying 200-plus years of American political practice. This is why as recently as 14 years ago the possibility of filibustering Clarence Thomas, for example, was not entertained even by a hostile Democratic Senate that was able to muster 48 votes against him. The American people seem to grasp this logic. In one recent poll, 82 percent said the president's nominees deserve an up or down vote on the Senate floor.

They are right. History and the Constitution are on their side, and on majority leader Bill Frist's side. When the Senate returns from its recess, the majority leader should move to enact a rule change that will break the Democratic filibuster on judicial nominees, confident in doing so that he is acting--the claims of Senator Durbin and the Financial Times to the contrary notwithstanding--in accord with historical precedent and constitutional principle.

--William Kristol

It's more than judges
The Washington Times, 5/1/05
By Lawrence Kudlow

Senate Minority Leader Harry Reid doesn't seem to understand George W. Bush won the presidential election last November. He also doesn't get it that Republicans picked up five Senate seats. That's called a mandate.

Still, Mr. Reid believes he can negotiate, even dictate, which judicial appointments can be voted in the Senate.

That's utterly preposterous, and it's one of many reasons Senate Majority Leader Bill Frist must put Mr. Reid and the other filibustering Senate Democrats in their place at last.

There is no political or constitutional reason every presidential judicial nomination should not be voted on. That includes nominees for the Supreme Court, the appellate courts and on down the line. But the Senate Democrats stand in the way of nearly every nominee the president sends over, vowing even to refilibuster many he nominated in his first term.

But before we get into what can be done, let's carefully look at the Democrats' broader strategy -- a carefully constructed plan to obstruct and undermine the conservatives' postelection reform agenda for both foreign and domestic policy.

After blocking the judicial nominees, the Democrats will try to obstruct all pro-growth, pro-business legislation that makes it to the Senate. On the energy bill, they could try to filibuster any legislated drilling in the Arctic National Wildlife Refuge (ANWR). They could hold up the budget because they don't want to extend the president's tax cuts on

capital gains and dividends. If a good asbestos bill comes around, they could obstruct that, too. The Central American Free Trade Agreement and other free-trade measures could be stopped.

It's already more than judges. Sen. Max Baucus, Montana Democrat, has a hold on all Treasury Department nominations, including one deputy secretary, two undersecretaries and three assistant secretaries. One of the assistant positions oversees terrorist money flows.

Why is Mr. Baucus doing this? He doesn't agree with U.S. policy on Cuba. Instead of filling some important posts in an important government department, he's aiding the Castro-Chavez axis.

Make no mistake: The Democratic strategy is to attempt to encroach on presidential authority in every single area. Why do you think John Bolton is having such a tough time being confirmed as U.S. ambassador to the United Nations? Judges, Treasury, Mr. Bolton -- they're all linked.

There's a way around this, of course. It's called the "nuclear option," and it has been used before -- by Senate Democrats.

In 1975, Sen. Robert Byrd, West Virginia Democrat, introduced a bill co-sponsored by liberal Republicans Robert Griffin and Hugh Scott, along with old liberal Democratic warhorse Mike Mansfield. The bill was meant to change the standing rules and permit "limitation of debate" (i.e., ending a filibuster) with a three-fifths vote of the whole Senate.

The Byrd resolution was postponed indefinitely. But in March 1975, a bill sponsored by then-Sen. Walter Mondale included the same language as the Byrd bill, and it passed. Any change of the standing rules today is labeled the "nuclear option." Back then, a rule-change seemed only a small firecracker.

According to reports, Mr. Byrd also changed Senate precedents with simple up-or-down majority votes in 1977, 1979, 1980 and 1987. In other words, there is a clear history of rule-changing by the very same "nuclear option" Mr. Byrd vehemently objects to today.

But once the bomb, or firecracker, goes off in the Senate, the air will clear. With an end to judicial filibusters, Judges William Pryor, Priscilla Owens, Richard Griffin, Henry Saad and Susan Neilson will all get a fair shot at confirmation. The business community, which has opposed to the nuclear option, also will enjoy the filibuster-free air. Senate Democrats, under the new rules, will find it more difficult to obstruct tort reform, energy reform and possibly Social Security and tax reform.

While there is a precedent for changing the rules in the Senate, there is none for the type of obstructionism we're seeing from the modern Democratic Party. As Hugh Hewitt and Duane Patterson note, exactly one judicial nominee was filibustered on the Senate floor

in the 20th century: the ethically challenged Judge Abe Fortas. Five years in, there have already been 10 such filibustered nominees in the 21st century.

It's the height of hypocrisy for Messrs. Byrd, Reid and other Democrats to protest Senate rules inviolability, when it's clear they're only concerned with their own political advantage.

It's time for Senate Republicans to go nuclear. It's time for the president and the GOP to enjoy the mandate they earned in the voting booth last fall.

Frist: Showdown with Democrats over court nominees may be 'inevitable'

By Kathy Kiely, USA TODAY

WASHINGTON — Senate Majority Leader Bill Frist says he's "running out of options" in a fight with Democrats over President Bush's judicial nominees.

In an interview with USA TODAY, the Tennessee Republican said he believes a showdown over Bush's federal appellate court nominees is "almost inevitable." He said he'll push for a vote on the judicial candidates before Memorial Day because the "extreme partisanship" in the Senate justifies the move.

"There are times in history where you have to change either the rules or the precedent based on external behavior," he said Friday.

The battle is over how much power the Senate's Democratic minority should have in the confirmation process of Bush's judicial nominees. The appellate courts are important because they set legal precedent in cases that don't make it to the Supreme Court. Federal judges are appointed for life.

Even though Republicans control the Senate 55-45, Democrats have been able to block the nominees by using the filibuster to keep them from coming up for a vote. The filibuster is a tactic to kill a measure or nominee by refusing to end debate. It takes 60 votes to end a filibuster.

Although Frist acknowledged that he still has work to do with some of his own Republicans, he said he will have the votes to declare the filibuster of Bush's nominees unconstitutional.

He also said he's concerned about Senate Democratic leader Harry Reid's threats to retaliate by slowing down legislative activity, which could jeopardize presidential priorities such as the energy bill and an overhaul of Social Security. But Frist predicted Democrats will cave to political pressure and end such blockade.

"They'll continue to pull back from that," he said.

In the last Congress, Democrats filibustered 10 of the president's appellate court nominees. This year, Bush renominated seven of them. Democrats like Edward Kennedy of Massachusetts and Charles Schumer of New York say these Bush nominees are insensitive to the legal claims of teenagers seeking abortions, minorities who want redress for injustices and consumers who want to sue corporations. Reid, a Nevada centrist who opposes abortion, has described them as "extremist."

Republicans say Democrats are blocking jurists who are needed on backlogged courts. Though only 16 of the nation's 179 appellate court seats are vacant, 14 of them qualify as "judicial emergencies" because the seats have been vacant so long that other judges are becoming overwhelmed with work. Four of those vacancies are in the 6th Circuit, which covers Frist's home state of Tennessee. "We're having justice being denied with the backup of cases," he said.

Behind the appellate judge fight looms a larger one over the next Supreme Court nominee. Chief Justice William Rehnquist has missed sessions this year because of cancer treatments. All but one of the justices are 65 or older.

Frist, a surgeon, plans to retire from the Senate when his term ends next year. Reid and other critics have suggested Frist's efforts to end the filibuster are part of his bid to line up conservative support for a 2008 White House race.

"I'm going back to my medical practice in Nashville," says Frist, 53. "Then I'll decide."

FRIST ON OTHER ISSUES

Here's what Senate Majority Leader Bill Frist had to say on:

The controversy over his speech at a teleconference sponsored by the Family Research Council. The event cast Democratic opposition to certain judicial nominees as an assault on "people of faith":

"My remarks were pretty direct: It's up or down vote (on judicial nominees), fairness, duty, responsibility. And in no way said that this (debate about judges) is a religious argument. I don't think it's a religious issue. There are people of faith on both sides.

"There's been an attempt to pigeonhole the debate into being some sort of extremist - using their words, 'radical Republican' or 'evangelical' - debate. It's smart from the sense of the other side of the aisle in that it takes the attention off the fundamental principle of an up or down vote. It is wrong because that is not what's driving it."

Democrats' threats to block GOP legislation if they can't filibuster judicial nominees:

"There are lots of ways they can throw wrenches into the gears of government if that is their goal. I don't think that the other side of the aisle is going to shut down the government. Maybe for positioning and maybe for rhetoric and maybe for partisan purposes, and maybe for fundraising purposes and direct mail (solicitations) they will say they'll shut down the government. But I can't believe that as United States senators representing their millions of constituents that they would act that radically."

Which judicial nomination he'll bring to a vote first:

"You could go with people who have been waiting the longest. Or the court that has the most vacancies. But I haven't decided."

His plans to retire from the Senate at the end of next year and possibly run for president in 2008:

"I'm a heart and lung transplant surgeon. That's my life. For me, the option to return and be able to save lives every day is one that's very attractive and equally attractive to other options."

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